

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND/NORTHERN DIVISION
3 RAMOND WOLLARD,

4 Plaintiff

5 CIVIL NO.

6 v.

 L 20-2068

7 Second Amendment Foundation, Inc. July 21, 1011

8 Defendant

9 _____ /

10 TRANSCRIPT OF MOTIONS HEARING

11 BEFORE THE HONORABLE BENSON E. LEGG,

12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 On behalf of the Plaintiff:

15 Alan Gura, Esquire

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19 On behalf of the Defendant:

20 Matthew J. Fader, Esquire

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23 Reported By:

24 Jacqueline Sovich, RPR, CMR, FOCRR

25 Official Court Reporter

1 (PROCEEDINGS)

2 THE COURT: This is a hearing in the case of Wollard,
3 et al, versus Sheridan, et al. I thank counsel for their very
4 fine briefs, which were enjoyable to read and laid out the
5 issues.

6 Essentially, this case tests whether Maryland's
7 regulatory system requiring a citizen, even a law-abiding
8 citizen with a good record, to demonstrate a good and
9 substantial reason for carrying a handgun outside the home
10 violates the Second Amendment to the United States
11 constitution.

12 The principal Supreme Court cases governing this area
13 are Heller and McDonald. There are two highly instructive, but
14 not ultimately deciding Fourth Circuit cases, Chester and
15 Masciandaro. And there has been a recent Seventh Circuit case
16 of interest, the Ezell case.

17 One of the primary threshold issues is whether there
18 is a principal of constitutional avoidance that decides this
19 case without the necessary either to recognize a Second
20 Amendment right outside the home or to begin the process of
21 defining that right.

22 This issue focuses us on the disagreement between
23 Judges Niemeyer and Wilkinson in the Masciandaro case. Judge
24 Niemeyer writing for himself ruled that a Second Amendment
25 right to carry a firearm outside the home does exist and is

1 subject to intermediate scrutiny. The law passed, however,
2 because Mr. Masciandaro had the handgun in his car in a public
3 park.

4 Judge Wilkinson writing for himself and Judge Duffy
5 held that the constitutional issue could be avoided, that the
6 panel did not need to decide if one has a Second Amendment
7 right to possess a handgun outside the home. Because if such a
8 right did exist, the restriction at issue in Masciandaro would
9 be subject to intermediate scrutiny and would pass intermediate
10 scrutiny.

11 So those are the essential issues in a letter of July
12 18, 2011, I posed a number of questions to counsel. During
13 your presentations, please answer the questions, but you're
14 free to roam elsewhere. The key questions identified at the
15 end of the letter are to the regulations here at issue satisfy
16 intermediate scrutiny and what is the nature and extent of the
17 State's interest in the regulations?

18 How do these regulations -- how are these regulations
19 tailored to advance the state's interest? And if challenged,
20 the regulations would not satisfy intermediate scrutiny, does
21 the Second Amendment right extend outside the home at all?

22 Good. So why don't I begin first with plaintiff's
23 counsel. And who will be arguing for the plaintiff?

24 MR. GURA: Good morning, Your Honor. I will, Alan
25 Gura for the plaintiff. And also seated with is Carrie Hansel,

1 my co-counsel, and the plaintiff, Mr. Raymond Wollard.

2 THE COURT: Good morning to all. Before you begin,
3 let me have counsel for the defense introduce themselves as
4 well, if you would, please.

5 MR. FADER: Good morning, Your Honor. Matt Fader for
6 the defendants. With me at counsel table is Dan Friedman and
7 Steve Ruchman.

8 THE COURT: Good morning. Good. Mr. Gura, are you
9 going to argue, sir?

10 MR. GURA: Yes, Your Honor.

11 THE COURT: And you can either use the podium or you
12 can stand in place. If you're going to stand in place, I would
13 simply ask that you pull the microphone close. Good. That
14 should suffice.

15 MR. GURA: Thank you, Your Honor.

16 Your Honor, I probably speak for both sides in
17 starting by thanking the Court for the Court's letter of July
18 18. It's always helpful to counsel to see where the Court's
19 concerns lay, and it gives us a good blueprint to shape our
20 arguments so that we have the most efficient use of our time
21 here.

22 And having said that, I would like to start by going
23 down the list of items provided by the Court and providing our
24 views with respect to some of these issues and questions.

25 The Court starts by noting four opinions that are

1 said to not be in serious dispute. I would like to address
2 some of those points ever so briefly.

3 At first, the Court says that -- and I'm reading here
4 from the letter the Court of the Second Amendment protection as
5 articulated in Heller and McDonald encompasses the right of
6 law-abiding individuals to possess handguns in the home for
7 self-defense.

8 Your Honor, the plaintiffs would dispute that the
9 core right protected by the Second Amendment is limited to the
10 home. The Second Amendment's text speaks of the right to keep
11 and bear arms. There's no distinction amongst the two rights.
12 They're both covered by the Second Amendment.

13 And, in fact, the Fourth Circuit has held in Chester
14 in reducing the level of scrutiny for the criminal defendant in
15 that case. The Court held that the core right protected by the
16 Second Amendment is the right of law abiding responsible
17 citizens to possess and carry a weapon for self-defense.

18 THE COURT: Good. If I could just stop you for a
19 minute? There's a statement in the Masciandaro case, in which
20 Judge Niemeyer's discussing Chester, and he writes that we have
21 held that intermediate scrutiny should be applied when
22 reviewing a Second Amendment challenge, which prohibits the
23 possession of firearms by a person convicted of a misdemeanor
24 crime of domestic violence.

25 He goes on to say that although Chester asserts his

1 right to possess a firearm in his home for the purpose of
2 self-defense, we believe that his claim is not within the core
3 right identified in Heller, the right of a law-abiding
4 responsible citizen to possess and carry a weapon for
5 self-defense.

6 By virtue of Chester's criminal history as a domestic
7 violence misdemeanor, accordingly, we conclude that
8 intermediate scrutiny is more appropriate than strict scrutiny
9 for Chester and similarly situated persons.

10 It appears to me that at least Judge Niemeyer
11 recognizes a Second Amendment right that operates outside the
12 home. But he says that, so far, the Supreme Court in Heller
13 and McDonald has only explicitly specifically recognized a core
14 right inside. That's what I was trying to say in that first
15 paragraph. And I'm simply looking at the case law as it
16 exists.

17 So inside the home, law abiding person, good record,
18 et cetera, the constitution guarantees a person the right to
19 possess a handgun inside the home.

20 But outside the home, it's, who knows? So is that
21 right?

22 MR. GURA: No, Your Honor. We would disagree with
23 that. In Heller, one of the key issues in the case was the
24 meaning of the term bear arms. The District of Columbia had an
25 argument that the term bear arms and had a collectibles

1 connotation. It meant soldier or go off into battle, and that
2 was an inherent limitation on the character of the right. And
3 in order to address that concern, the Supreme Court had to
4 define the meaning of the term bear arms, and it explained that
5 to bear arms meant to carry them.

6 It then went on to explain that the right was not
7 limited, there are time, place, and manner restrictions that
8 are appropriate, sensitive place type questions that will
9 arise. The extent that it acknowledged in Heller that at right
10 would be extending beyond the home as we've noted and,
11 respectfully, that part of the Court's discussion of the
12 meaning of the term bear arms was required for the holding. It
13 was part of the Court's rationale.

14 Moreover, the Court also instructed at the very
15 beginning of the Heller opinion that we interpret the Second
16 Amendment by looking to see what the words and phrases in that
17 text meant to the people who ratified it. How was this
18 language understood by the voters?

19 So even if the Supreme Court's historical description
20 of the term bear arms was not part of the Court's essential
21 holding, which we would dispute, but even if that were the
22 case, nonetheless, we would then assert under the rule of
23 Heller that says we need to look at the original meaning of the
24 language, that the Supreme Court's definition is a correct one,
25 and defendants have not offered an alternative definition for

1 the term bear arms. They argue that Heller is limited to the
2 home because that's the context in which the case arose, but
3 what I don't see in the other side's very excellent pleadings
4 is any alternative meaning of the term.

5 So we would argue that bear arms means to carry them.
6 The Supreme Court has held as much, and that is a core right at
7 least when it's exercised by law-abiding people. That does not
8 mean that every restriction on the right to bear arms is going
9 to be subject to strict scrutiny.

10 This leads me to the second --

11 THE COURT: Before we move on, let me see if quote a
12 passage from Judge Niemeyer to see if you're in agreement that
13 this essentially expresses his views about Heller.

14 He says that the Second Amendment right were confined
15 to self-defense in the home, the Court, meaning the Supreme
16 Court, would not have needed to express a reservation for
17 sensitive places outside the home. But the Heller court
18 describes as the general pre-existing right to keep and bear
19 arms for participation in militias, for self-defense, and for
20 hunting is thus not strictly limited to the home environment,
21 but extends in some form to wherever those activities or needs
22 occur. Just as other amendments apply generally to protect
23 other individual freedoms.

24 But I would not conclude that the right is
25 all-encompassing such as it extends to all places or to all

1 persons as explicitly recognized in Heller. The complex
2 question of where it, meaning the Second Amendment right, may
3 apply outside the home and what persons may invoke it is,
4 however, not one that we need to fully answer, because it
5 appears sufficiently clear that, in this case, Masciandaro's
6 claim of self-defense was asserted by him as a law-abiding
7 American citizen sleeping in his automobile in a parking area
8 does implicate the Second Amendment both be it subject to
9 lawful limitations.

10 So are you on board with Judge Niemeyer's analysis
11 that there is a Second Amendment right to bear arms outside the
12 home? But that right is subject to certain limitations and
13 would be measured by intermediate scrutiny.

14 MR. GURA: We are largely in agreement with that. In
15 fact, we are always entirely in agreement with that. The only
16 reservation I would make, Your Honor, is that Masciandaro was
17 subject to intermediate scrutiny because it was a time place
18 and manner case. The case actually concerned place. In a
19 national park.

20 And traditionally time, place, and manner is a form
21 of intermediate scrutiny. And so of course if the government
22 is going to have a sensitive place restriction, we disagree
23 with the final outcome in that case, but the premise that is
24 that time, place, manner analysis would apply in the Second
25 Amendment that's been recognized at least in the First

1 Amendment context as the form of intermediate scrutiny, that,
2 yes, we would agree with. We are not alleging that there is an
3 absolute right to carry guns, everywhere at all times, in any
4 manner, by all people.

5 The difference, though, between our case and the
6 Masciandaro case is that here we don't have a time, place, or
7 manner restriction. The issue here is whether people can
8 exercise the right at all. And if the State of Maryland wishes
9 to in fact and in fact they have enacted various restrictions
10 on time place and manner, then we leave that to another day.
11 That's simply not a part of our claim.

12 So it's important to note, Your Honor, if I may
13 return to the Court's list of ideas on this point at least,
14 that --

15 THE COURT: Good. If I could just stop you for a
16 moment. I was looking in your statement of facts, that I
17 thought did a very good job of framing the issue.

18 MR. GURA: Thank you.

19 THE COURT: Let me see if I can find it.

20 You say that when individuals enjoy a constitutional
21 right to engage in some activity, a license to engage in that
22 activity cannot be conditioned on the government's
23 determination of their meaning the citizen's need to exercise
24 that right.

25 Defendants imposed this classic form of

1 unconstitutional prior restraint against the fundamental
2 individual right to keep and bear arms. They must be enjoined
3 from doing so.

4 So if we look at the assertion, I believe that you've
5 told me that time, place, manner restrictions can be okay
6 governed by intermediate scrutiny. I would assume also that
7 limitations on type of weapon, no sawed-off shotguns, no guns
8 with obliterated serial numbers, no automatic weapons and the
9 like would also pass muster.

10 And, finally, a limitation on who may carry a firearm
11 outside of the house and who restrictions would prohibit, for
12 example, felons, Chester, misdemeanor, certain misdemeanants,
13 people who have history of alcohol abuse, people who have
14 mental health problems.

15 So that it would seem to me sensible in a regulatory
16 scheme that one would have to apply, you'll have to tell me at
17 some point whether you're attacking the whole need to apply
18 system that Maryland has.

19 Two, it seems to me reasonable to restrict the type
20 of weapons. And then you have time, place, and manner, can't
21 have a firearm near a school, in the airport, in a court
22 building, et cetera.

23 As I understand the core of your argument, it's that
24 the plaintiff passes muster under any kind of examination of
25 his background as a law abiding citizen, U.S. Naval Veteran, no

1 criminal record, no mental health problems, no alcohol
2 problems, nothing in his conduct that would target him as a
3 person who should not possess a firearm.

4 At one time, the state permitted him to carry a
5 firearm outside the house because of the threat posed by his
6 either present or former son-in-law who had a drug problem, and
7 who invaded the house.

8 The state has now determined that that threat is no
9 longer current, is too remote to justify the plaintiff having a
10 firearm outside the house. So your attack is really on the
11 requirement that the law-abiding citizen produce a good and
12 sufficient reason, and the state's claimed right to review that
13 reason to see if it is good and substantial in their view, is
14 that the essence of it?

15 MR. GURA: That is correct, Your Honor. Our
16 contention is that if you have the right to do something, you
17 do not have to prove to the state your entitlement to engage in
18 the right.

19 While we would agree with the Court's description of
20 Mr. Wollard as a fully qualified individual to exercise his
21 Second Amendment rights, the real issue there is not so much
22 our view of Mr. Wollard, but the fact that the state has not
23 identified any specific reason why he should be prevented from
24 exercising his constitutional rights, if he -- if he had
25 something in his background, if something turned up and the

1 state wished to point to some reason, for denying Mr. Wollard a
2 permit, then the Court could evaluate the basis of the denial,
3 whether or not it's constitutionally sufficient, and that would
4 be a very different kind of case than the very narrow kind of
5 case that we have brought.

6 So we don't --

7 THE COURT: Let me just stop you then to see if this
8 is accurate.

9 So that, under your view of the constitution, the
10 state has the right to require an application, to review the
11 applicant, but if the applicant shows up at the license window,
12 applies, there is a review, the state goes down the checklist,
13 no criminal record, no mental health problems, good and
14 law-abiding, and so on and so on, that the state must issue the
15 carry permit and cannot ask why do you want to carry a gun?

16 MR. GURA: That is correct, Your Honor. Not any more
17 than the state would be able to ask why do you want to have a
18 demonstration, why do you want to assemble, why do you want to
19 speak?

20 All we are saying, Your Honor, is that the state in
21 licensing and regulating this activity, needs to do so if it
22 wants to license and regulate it, it needs to do so according
23 to specific objective standards that meet some constitutionally
24 sufficient justification.

25 And all of the standards that Your Honor has noted,

1 criminal background check, for example, easily pass
2 constitutional examination.

3 And in fact, Mr. Wollard has been required to go
4 through a background check. He was required to obtain
5 training. We don't challenge any of that. And if the state
6 wants to come up with any number of other objectively
7 delineated requirements, they can be evaluated by a court, then
8 that will be fine with us, and providing that all those
9 requirements are constitutionally sufficient, then that's not a
10 problem.

11 The only --

12 THE COURT: Let me just stop you for a minute, then.

13 MR. GURA: Sure.

14 THE COURT: To test what you just said. So that if I
15 were to agree with you in this case, and find in your favor, I
16 would not be recognizing an unlimited right of United States
17 citizens who passed background checks and who were carrying
18 reasonable handguns to carry those handguns anywhere they
19 wanted at any time. The state would still retain the ability
20 through legislation or regulation to impose reasonable time,
21 place, and manner restrictions, and those restrictions could be
22 tested one-by-one in later proceedings.

23 This case tests only the constitutional ability of
24 the state to turn down the application because the plaintiff
25 has not come forward with the good and sufficient reason for

1 wanting to carry a gun.

2 So I'm not being asked to recognize a sweeping
3 wholesale anything goes right to carry handguns anywhere people
4 want to.

5 MR. GURA: That's correct, Your Honor. We are not
6 making that kind of claim. And it's absolutely not part of our
7 complaint.

8 Your Honor, with respect to the Court's
9 identification of the issue of whether or not intermediate
10 scrutiny is appropriate, when considering legislation
11 regulating conduct outside the core area, but still within the
12 scope of the Second Amendment right, our answer would be not
13 always.

14 And we point to the recent case of Ezell versus City
15 of Chicago, which the Court noted in its letter as a very good
16 example of that. In Ezell, the issue was the right of people
17 to operate and access a gun range for the purpose of engaging
18 in traditional shooting activity for safety reasons, to improve
19 their proficiency with firearms. And also we made allegations
20 in that case, forced our traditional sporting and recreational
21 uses of gun ranges. The Seventh Circuit applied higher than
22 intermediate scrutiny to the related ancillary right they held
23 of practicing with a firearm.

24 We alleged that the right to practice with a firearm
25 is a core right of the Second Amendment, the Seventh Circuit

1 seemed to note it might not be necessarily at the core, but
2 it's very close to the core.

3 In any event, what the Seventh Circuit held was they
4 would apply a standard of scrutiny to this activity higher than
5 intermediate scrutiny. The Skoien case in the Seventh Circuit
6 was like Chester, a domestic violence misdemeanor case where
7 in that case, in Skoien, the law survived intermediate
8 scrutiny.

9 In Ezell, however, the Seventh Circuit said here we
10 are dealing with law-abiding people. The right of law-abiding
11 people to train with firearms is very close to the core of the
12 Second Amendment. And so even if not quite strict scrutiny
13 would apply to the regulation at issue, it would be higher than
14 the intermediate standard.

15 THE COURT: Sort of advance the intermediate
16 scrutiny.

17 MR. GURA: That's correct. And we see this also in
18 other areas, for example, in the First Amendment, most people
19 --

20 THE COURT: If I could just --

21 MR. GURA: Sure.

22 THE COURT: Strict scrutiny seems to be sort of the
23 death sentence for the regulation. So what advanced
24 intermediate scrutiny would do, it would elevate the scrutiny
25 beyond intermediate, but not doom the regulation to an untimely

1 death. So it's sort of the regulation can be upheld, but you
2 have to have a really good reason rather than just a good
3 reason.

4 MR. GURA: We would claim actually, Your Honor,
5 there's been some studies that apply strict scrutiny in
6 constitutional cases, and they're not always a death sentence
7 for the regulation.

8 And I can think of any number of Second Amendment
9 regulations that would survive even strict scrutiny. For
10 example, a ban on violent felons from having firearms.
11 Obviously, there's a very compelling state interest there to
12 keep dangerous people from having guns.

13 THE COURT: In the federal system, any felon, one of
14 the most frequently encountered federal crimes is 922(g), the
15 possession of a firearm by a prohibited person, defined as a
16 person who, I know the elements by heart, has been convicted of
17 a crime punishable by imprisonment for 365 days or more. That
18 person, that's the definition of a felony, and it's illegal for
19 such a person to possess a firearm, so you don't have been
20 violent, you can be the crime could have been a non violent
21 crime.

22 MR. GURA: Courts have questioned whether or not
23 922(g) is overbroad or sufficiently tailored. We would only
24 offer it's not really part of this lawsuit that plainly at
25 least when you're speaking about violent felons, there's no

1 dispute strict scrutiny would not threaten 922(g) in at least
2 that context.

3 So we don't think that strict scrutiny is necessarily
4 fatal to everything, nor do we think that immediate scrutiny
5 means that the government wins. In fact, intermediate scrutiny
6 requires the government not the plaintiff in this case to
7 justify its law. The burden is always with the government
8 whenever you are dealing with fundamental rights.

9 But all the same, the fact is that we see in many
10 constitutional areas courts adopting either strict scrutiny or
11 very other stringent forms of high review to the exercise of
12 rights beyond the Court.

13 In the First Amendment free speech area, most of the
14 people would agree that political speech lies at the core of
15 the First Amendment. Yet, we just saw this term, the Supreme
16 Court strike down regulations, content-based regulations on
17 violent video games, not all of which are necessarily
18 political. It was enough that this was a content-based
19 restriction on speech.

20 In the Second Amendment right, we do have some laws
21 in some places that are being challenged where the government
22 has decided to ban gun sales. Well, we would claim if you have
23 a right to have a gun, you should be able to purchase it
24 somewhere.

25 The Second Amendment protects more than the right to

1 manufacture a gun in one's home, and so if the right to
2 purchase and sell firearms is protected by the Second
3 Amendment, we think that we would like as in Ezell, we would
4 see higher levels of scrutiny applied to those kinds of cases.

5 In this case, however, we're dealing only with a
6 right that is literally spelled out in the actual text of the
7 Second Amendment. Bear arms. And so at that point --

8 THE COURT: And that's because of the Supreme Court
9 in Heller decided the dispute whether the Second Amendment
10 applies only to a public right of the public to bear arms in
11 connection with a well-regulated militia, the Supreme Court
12 found that the right to bear arms was individual for the
13 traditional purposes of self-defense, hunting and the like, and
14 that the self-defense had two components. One component was to
15 protect the person against other people acting unlawfully, and
16 the second element of self-defense was to protect oneself
17 against I guess a repressive government acting
18 unconstitutionally.

19 MR. GURA: Yes. We would also add, Your Honor, to
20 Heller, there's another Supreme Court opinion, which is
21 relevant in this analysis, and that is of course U.S. versus
22 Miller from 1939.

23 Miller, of course, is a heavily disputed case, but
24 what nobody disputes is that it was a Second Amendment case
25 where the Supreme Court tried to discern whether or not a

1 sawed-off shotgun was a protected arm for purposes of the
2 Second Amendment.

3 What's interesting about Miller for our purposes is
4 that Mr. Miller was apprehended and indicted because he was
5 carrying the shotgun along the highways of Oklahoma and
6 Arkansas in his car. Clearly that case arose outside the home,
7 and nobody ever thought to stop and question whether or not the
8 Second Amendment applied.

9 You know, the Second Amendment, nobody stopped to
10 question whether or not the Second Amendment applied simply
11 because the firearm in that case was carried outside the home.

12 In any event, returning to some of the Court's stated
13 concerns, we would agree.

14 THE COURT: If I just could make one another point --

15 MR. GURA: Yes.

16 THE COURT: -- sort of implicated by the Miller case,
17 although Miller involves a sawed-off shotgun, the licensing
18 system in this case applies only to handguns, so that a citizen
19 has the right to carry a long arm including a shotgun, any
20 loaded or unloaded anywhere they want to go and to have it in
21 their car, not any -- they can't take it in the ballpark, but
22 they can carry it around.

23 And under the regulatory system, the law, people who
24 run businesses have to carry cash, you know, from their
25 business someplace else, or in their business are regularly

1 given the ability to carry or to wear a handgun.

2 But the essential point is that the system here
3 really applies -- that the problem is it applies to handguns
4 and that people outside the home can carry long arms, and a
5 person can carry a handgun in his or her car provided that the
6 handgun is unloaded and that the ammunition is in a separate
7 container.

8 So that you can take your unregistered -- or that you
9 can take your handgun to the firing range, for example, you
10 have to have it unloaded in your car, and the ammunition has to
11 be someplace else. So this is a really a handgun case rather
12 than a long arm case.

13 MR. GURA: Your Honor, this is a Second Amendment
14 case, and this exact argument that we see from the defense in
15 this case was an argument that was raised in Heller and then in
16 McDonald, and it was rejected both times by the Supreme Court
17 in Heller. It was also rejected by the D.C. Circuit.

18 The argument that posed by the defendants is that
19 because people still have a right to carry long guns, their
20 self-defense interests are protected.

21 That sort of analysis is rejected. We don't prevent
22 people from having their constitutional right exercised in one
23 manner simply because we allow it in another. For example, we
24 don't tell people that you can't carry any kind of firearm
25 because you can carry a sword or a baton. We don't tell people

1 that they shouldn't be upset that their religion has been
2 banned because they may still worship other gods.

3 But so long as the traditional expectation as its
4 understood with respect to the right is the people have the
5 right to engage in some activity, here self-defense with a
6 handgun, that has to be respected by the government.

7 Now, of course, there can be regulations placed on
8 the type of weapons that are carried. Some weapons would not
9 be within the traditional understanding of what's protected by
10 the Second Amendment.

11 And in addition, sometimes even a weapon that might
12 be protected by the Second Amendment is carried in a manner
13 that the government has the right to prohibit.

14 One case that made this very clear was the Third
15 Circuit's opinion in the Marcella decision where the issue
16 there was the possession of a handgun that had an obliterated
17 serial number. The Third Circuit held that, while the handgun
18 was functionally indistinguishable whether it has a serial
19 number or not, it's still a handgun, it would work the same.

20 That was a manner case, because you don't have the
21 right to possess a handgun in the manner of having an
22 obliterated serial number.

23 With respect to something like a sawed-off shotgun,
24 the question at issue in Miller, that's more a question of
25 whether the arm itself is a protected arm within the meaning of

1 the Second Amendment.

2 However, the one thing that is very clear from Heller
3 and from McDonald as well is that once a person has the
4 entitlement or the right to a particular type of firearm, in
5 those cases, handguns, it is not an answer to say that, well,
6 you can have some other kind of firearm. And especially when
7 we're talking about the right to carry a weapon in
8 self-defense, it is not practical to walk around the streets of
9 Baltimore or Annapolis with a rifle or a shotgun. That is not
10 an appropriate defensive weapon, for most normal people at
11 least. I'm not sure anybody would, in the ordinary course of
12 life, walk around with a rifle to fend off a sudden criminal
13 attack. That's simply impractical.

14 Nor is it practical to walk around with any kind of
15 firearm that happens to be locked in the container and
16 unloaded, perhaps even inaccessible in a different compartment
17 of one's vehicle. Those are not the kinds of activities that
18 enable people to exercise the right of self-defense.

19 Heller, of course, had this issue specifically
20 because the District of Columbia there required handgun, that
21 all firearms in the home at all times be kept in an inoperable
22 condition, and there was not even an exception for home
23 self-defense.

24 And, of course, the Supreme Court dispensed with
25 that. If you have the right to have a firearm, you have the

1 right to have a firearm that works and is accessible to you
2 under normal circumstances.

3 So the fact that people can have rifles or shotguns,
4 it's very interesting, but that's not really a defense to the
5 claim of the right to have a handgun for self-defense.

6 We would agree with the Court that this case does not
7 implicate any of the presumptively lawful regulatory measures
8 listed until Heller. Notably among that list of presumptively
9 lawful regulatory measures are sensitive place restrictions.

10 As we've noted already, this is not a sensitive place
11 type issue as the Masciandaro case was. And, finally, the
12 Court observed at least in those first four points the Court
13 was wondering whether it should consider the regulatory scheme
14 as a whole rather than analyzing only the challenged portions
15 of the law. And I think, Your Honor, we have gone over that.
16 We are only targeting this one very narrow specific provision
17 of the regulatory scheme.

18 If we were to prevail, the State of Maryland can
19 still deny people permits and arrest people who don't have the
20 permits. The only thing they can't do is deny the permits for
21 this very specific reason of not proving a good and sufficient
22 reason according to the state's idea of whether people should
23 have the right.

24 Moving on to the Court's other concerns in the
25 letter, the Court asked whether regulations here at issue would

1 satisfy intermediate scrutiny. And with respect to that
2 question, the Court asked what is the nature and extent of the
3 State's interest in the regulation? And how are these
4 regulations tailored to advance the state's interest?

5 We don't believe, Your Honor, that intermediate
6 scrutiny is applicable, at least to the Second Amendment
7 portion of our claim. We don't believe that any means and
8 standard of review is applicable to the Second Amendment
9 portion of the claim, because while the state has the profound
10 interest in public safety and, according to that interest, it
11 may regulate the carrying of handguns and public and restrict
12 certain people from doing so entirely, the state has no
13 interest at all, no legitimate interest in preventing people
14 from exercising their right.

15 What we see from the state here is an objection to
16 the idea of carrying handguns. They view this as inherently
17 dangerous and unacceptable activity that requires some
18 justification in order for it to be permitted.

19 They are entitled to that view. I understand many
20 people may feel that way, but the constitution reflects and
21 memorializes a different understanding of what people's rights
22 are.

23 And to the extent the state has an interest in making
24 sure that the wrong people don't carry guns or that people
25 don't carry the wrong guns, or that people are going to carry

1 guns in dangerous places or in dangerous manners, the state's
2 regulation that we're challenging does not address any of those
3 concerns at all. There is no relationship at all between
4 forcing people to justify the right to bear arms and any kind
5 of tailoring that's aimed at some specifically identified evil.
6 We do believe --

7 THE COURT: The point there is that if we were all at
8 the constitutional convention, or having a new constitutional
9 convention and we were all delegates, we might decide in this
10 highly urbanized environment where most people don't hunt, that
11 it's a bad idea for people to have the right to bear arms or at
12 least handguns.

13 And one of the problems with the bearing of handguns
14 is that, in our society, which is crowded, we're
15 constitutionally running into each other, and there are of
16 instances particularly driving cars where people get mad at one
17 another, and if there's a firearm handy, then the event may end
18 up tragically.

19 But as you point out, we're not -- we have to assume
20 the state's interest is not measured by what is the best policy
21 or what we would do if we were constitutional delegates. We
22 must uphold the constitution as interpreted by the Supreme
23 Court, which says that people do have a Second Amendment right
24 to keep and bear arms. So that decision has already been made.
25 So whether that's a wise policy or an unwise policy is not ours

1 to determine. It is what it is.

2 MR. GURA: That's correct, Your Honor. And McDonald
3 makes that very clear, because the City of Chicago asserted
4 where an urban environment, we have problems, guns before,
5 we're different here in Chicago than might work in other
6 places. And the Supreme Court was very emphatic in noting that
7 every provision of the Bill of Rights is said to have negative
8 impact on police and prosecutors.

9 If we were going to revise the bill of rights to
10 enhance the government's ability to fight and punish and deter
11 crime, we probably wouldn't start, I would say we would
12 probably not start with the Second Amendment. My guess is that
13 the Fourth Amendment would be in for substantial revision in
14 that kind of a constitutional convention.

15 More recently in Ezell, of course, the Seventh
16 Circuit followed that signal by holding that the fact that
17 people could go outside of Chicago to exercise their Second
18 Amendment rights to practice with guns was irrelevant. We
19 don't restrict constitutional rights on the basis of mere
20 geography. The fact that you can do it somewhere else is not a
21 defense.

22 Chicago has now been twice held by appellate courts
23 to be a part of the United States, and we would submit that
24 Maryland also is part of the United States. All of it. And so
25 the Second Amendment applies here whether people would think

1 it's a good idea or a bad idea. We simply are not in a
2 position to litigate that question.

3 THE COURT: One of the factors to take into
4 consideration, my understanding is that the police are very
5 much in favor of the regulatory system. It's the ideal age of
6 being a policeman being in Great Britain when I was growing up
7 and the Bobbies didn't even carry guns because nobody else had
8 guns. Being a law enforcement officer is very, very dangerous
9 reason difficult job, particularly if you're not the only one
10 carrying a gun.

11 So but your view would be that that may be a valid
12 point, but it can't carry the day in the face of the Second
13 Amendment.

14 MR. GURA: Not only that, Your Honor, but also in my
15 experience, at least, there are many police officers and
16 prosecutors who support people's ability to carry firearms in
17 public. There are many law enforcement officials who believe
18 that it's actually a public good, that it deters crime, that it
19 helps the police, because the police cannot be everywhere. The
20 police are not of the uniform opinion just like other
21 individuals in our society are not of uniform opinion. Police
22 are people, too, and they have all kinds of ideas and thoughts
23 about this.

24 THE COURT: Good. So if we're going down the list,
25 what do I do about the debate between Judge Wilkinson and Judge

1 Niemeyer? Is this a case in which there is a principal of
2 constitutional avoidance?

3 MR. GURA: No, Your Honor. I'm not sure how we could
4 avoid the constitutional question here, because it's the only
5 question that's been raised. At least in Judge Wilkinson's
6 opinion, Judge Wilkinson acknowledged that there would be cases
7 where the right would have to be examined outside the home.

8 Of course, Judge Wilkinson wishes to be cautious. He
9 doesn't wish courts to jump into that territory if it's not
10 necessary to do so.

11 But Judge Wilkinson did not go so far as to suggest
12 that the Supreme Court is a court of first impression --

13 THE COURT: Right.

14 MR. GURA: -- when it comes to these issues. And to
15 the extent that his opinion would be read that way, the Supreme
16 Court's many expressions of frustration along those lines
17 should be controlling.

18 The Supreme Court relies upon and expects the lower
19 federal courts to develop the law so that it can be in a
20 position to review issues if the courts are to refuse their
21 jurisdiction, the Supreme Court would be very busy, and it
22 would be converted into a very different type of tribunal.

23 So even Judge Wilkinson, who obviously is at the
24 maximal point of caution and reticence, acknowledges there are
25 going to be some cases. We submit that if this is not a case

1 where the right outside the home has to be examined, we don't
2 know what is. And in that particular case, Masciandaro, again,
3 they were able to avoid the core issue by saying it's a time,
4 place, and manner issue. And then they resolved the time,
5 place, and manner issue, but we don't have that option here.

6 THE COURT: He says -- Judge Wilkinson says there is
7 no such necessity here, and I was thinking about the only way I
8 can avoid it is to say there is a reading of Judge Wilkinson's
9 majority opinion, which says that the Second Amendment's right
10 outside the home recognized, if at all, in the first instance
11 by Supreme Court, which would then mean that I would write an
12 opinion if I agreed with the plaintiff that I think that the
13 Second Amendment does extend outside the home, and the
14 plaintiff can win.

15 But I can't recognize such a right, the case would
16 then go up to the Fourth Circuit. The Fourth Circuit would say
17 we can't recognize such a right, either, and the case would
18 then go up to the Supreme Court essentially undeveloped.

19 So while I think that Judge Wilkinson is absolutely
20 correct on the basis of the Masciandaro opinion, where there is
21 a way to avoid the constitutional issue, it must be taken, but
22 here it's a lot harder to see the end run.

23 MR. GURA: That's correct, and we don't see it. And
24 I don't believe that the defendants have offered an
25 alternative, either, to addressing Second Amendment issue.

1 They, of course, believe that we don't prevail, and they have
2 reasons for arguing that, but I haven't read any of their
3 briefs.

4 And, of course, they can correct me in a moment if
5 they see some other vision of avoiding the core question, which
6 is, of course, a different question than whether or not we
7 prevail.

8 Beyond the constitutional avoidance issues, the Court
9 also asked us about the application of First Amendment doctrine
10 and whether or not to what extent is First Amendment doctrine
11 properly applied in the Second Amendment context is it merely
12 instructive in determining the level of scrutiny applicable to
13 the circumstances or do concepts such as prior restraint and
14 overbreadth apply as well?

15 Your Honor, we would contend that other concepts
16 apply as well. The reason that courts include the Fourth
17 Circuit, but by no means only the Fourth Circuit as we've seen
18 throughout the country, the reason the courts repeatedly look
19 to the First Amendment when developing Second Amendment
20 doctrine because these amendments are actually quite similar in
21 their function. They both secure the right to engage in some
22 sort of activity that the government cannot fully intrude into.

23 THE COURT: And sometimes unpopular rights.

24 MR. GURA: That's correct. And so you see the time,
25 place, and manner analysis, which is different than content

1 analysis. And of course you see prior restraint analysis,
2 which answers a very different kind of question.

3 This is a classic prior restraint case. And we don't
4 even need to go into the Second Amendment cases that have drawn
5 from the First Amendment. We need only go as far as Staub
6 versus City of Baxley, where the Supreme Court announced that
7 wherever you have a freedom that the constitution secures, and
8 the ability to enjoy that freedom is subject to the will of the
9 licensing official, then you have a prior restraint.

10 THE COURT: So sort of the, well, you want to speak,
11 what is it that you want to say?

12 MR. GURA: That's right. Or is your speech going to
13 be harmful to society? Or are you a morally appropriate person
14 to offer these opinions or to engage in this conduct?

15 And in Staub,, the Court laid out a definition of
16 prior restraint. And in fact the term prior restraint was
17 distinguished from censorship. The Court said censorship or
18 prior restraint. So it's not merely an issue of content-based
19 restrictions.

20 Here we have a freedom of the constitution guarantees
21 the right to carry handgun in public for self-defense. If the
22 government wishes to regulate that, that's fine, they can
23 regulate that. But the regulation basically leaves it not
24 unbridled discretion bound by no standards whatsoever of the
25 official to determine whether it's a good idea for the person

1 to do that. We contend that is a classic form of prior
2 restraint.

3 And all we are asking is for the government to simply
4 adhere to objectively defined standards that can be evaluated
5 both in terms of what they require as well as in the way in
6 which they are applied.

7 The First Amendment is a wonderful guide here as it
8 is in so many other ways. We've seen the Court in Chester and
9 then late in Ezell also apply overbreadth analysis or at least
10 reject the no set of circumstances analysis using First
11 Amendment grounds. Again, that's appropriate in the Second
12 Amendment, because there will always be people who should not
13 have guns. Therefore, any gun law that one might imagine can
14 be properly applied to at least one individual.

15 But that's not to say that all gun laws are
16 constitutional simply because you can always find an instance
17 where they're properly applied. That's a First Amendment
18 doctrine.

19 The Supreme Court applied that kind of thinking when
20 in Heller the Court held that assuming there's no disqualifying
21 feature that Mr. Heller has, he must be issued a license to
22 have his handgun.

23 And likewise here. Yes, there are going to be people
24 who will not be able to carry handguns even if we prevail. But
25 that doesn't mean that because some people may not have guns,

1 all people can be barred from having guns. Again, that's a
2 First Amendment concept that works quite well in the Second
3 Amendment area as well.

4 And finally, Your Honor, to address Your Honor's
5 concerns, Your Honor asked about the appropriate role of social
6 science data in determining whether the state's carry law
7 passes constitutional muster. This is an area where the briefs
8 have been I think quite clear on both sides.

9 The state offers that this is very dangerous
10 activity, and they have an array of social scientists who will
11 attest to that. We have cited some contrary evidence, but we
12 don't rely on that necessarily because we think that that's
13 wholly irrelevant.

14 If there were a question about a specific regulation,
15 then we could talk about perhaps social science. For example,
16 if this were a case about whether certain kinds of felons or
17 misdemeanants to have firearms, then the government could be
18 expected to come in and say, look, here is a recidivism rate,
19 people who have been violent before will be violent again.
20 This is actually a useful law. It has a good fit with the
21 public policy, and the Court might be able to evaluate that
22 sort of data.

23 But the Court in Heller and McDonald cautioned that
24 the content of the Second Amendment is not to be determined on
25 the basis of social science. It is not up to the Court's

1 evaluation of empirical evidence that federal courts are not
2 necessarily ill-suited to referee, that every single thing
3 that's secured in our constitution is going to be controversial
4 from a social policy standpoint. That ranges from the
5 exclusionary rule to the income tax and of course free speech,
6 the right to bear arms.

7 There's nothing that we cannot point to some social
8 science that would claim it's a bad idea that it should not be
9 permit the --

10 THE COURT: I would assume then, if you think about
11 the Second Amendment or any right, there is a process of line
12 drawing, and that social science can be relative and helpful on
13 one side of the line.

14 For example, assume that all firearms were legal,
15 everybody could carry a firearm, state passes a regulation
16 saying you can't carry a firearm with an obliterated serial
17 number.

18 So there would the question would be, well, why not?
19 What's the reason for that? And then there would be -- there
20 could be appropriately a great deal of evidence from law
21 enforcement, social scientists everywhere as to why that is a
22 bad idea, and the general bad idea is that serial numbers help
23 track firearms, criminals like unregistered firearms because
24 they can't be tracked. There's a black market for firearms.
25 Legitimate people don't need unregistered and untrackable

1 firearms. And then the answer then is that, yes, the state can
2 prohibit unregistered or firearms with obliterated serial
3 number.

4 But while the right may be compressed, there is a
5 certain point at which it can be compressed no further. So the
6 way I was thinking about it is that social science, not off
7 limits, relevant and useful, but there comes a point where
8 social science cannot be used to obliterate the right or read
9 it out of the constitution.

10 It would be, for example, let's assume you had one of
11 the Bill of Rights amendments would say either that the right
12 of abortion may not be abridged, or that the right, or that
13 abortion may not be tolerated. There would be a great deal of
14 passionate debate on either side of that issue and a great deal
15 of social science statistics, health statistics, recidivism
16 rates, et cetera, but ultimately, the constitutional language
17 has to control despite the social science.

18 MR. GURA: That's correct, Your Honor. And there's
19 one very clear example of what the courts do all the time, and
20 that is in the First Amendment with respect to adult zoning
21 standards, the Court has held that people have a First
22 Amendment right to establish these establishments. They cannot
23 be completely forbidden, but they can be zoned for their
24 secondary effects.

25 So we also have cases, there have been some in this

1 court in this circuit, and there are some everywhere, where
2 social science plays a role in justifying the restriction,
3 whether it's as to hours or locations or concentration, or
4 set-offs.

5 But overriding all of the social science dispute as
6 to whether or not those zoning standards and other kinds of
7 regulations are appropriate, there's always the one caveat that
8 exists in City of Lanham versus Playtime Theater, which is
9 whatever else the government does, it can't use this regulatory
10 power to completely bar the operation of these establishments.
11 There has to be some practical way for people to engage in
12 them, in their constitutional rights.

13 And there, of course, we have an activity, which many
14 would claim perhaps lies at the periphery of the First
15 Amendment. And so, of course, here we would say, yes, there
16 might be a role for social science to play in assessing
17 regulations, but it cannot alter the definition of the core
18 right simply because the government thinks it's a bad idea.

19 THE COURT: Good. Thank you.

20 Why don't we take a 15-minute recess, and then I'll
21 hear from you, Mr. Fader.

22 (Recess)

23 THE COURT: Thank you. Please be seated.

24 Mr. Fader, I'm all ears, sir. I'm happy to hear from
25 the state.

1 MR. FADER: Thank you very much.

2 THE COURT: If you could just address the two, or the
3 one preliminary issue first, and then you can go in any order
4 that you wish, and that is, is there a ground of constitutional
5 avoidance?

6 MR. FADER: Thank you, Your Honor. Actually, I was
7 going to begin by addressing sort of the framework of the
8 Masciandaro case, which I think directly addresses that
9 question. I think there is a framework for a constitutional
10 avoidance depending on how Your Honor answers the question that
11 the Fourth Circuit directed districts courts to answer first.

12 The Chester decision set out two questions that
13 courts are supposed to ask in looking at the Second Amendment
14 challenges, one being is it within the scope of the Second
15 amendment? And the second being if it is, does it satisfy the
16 appropriate level of means and scrutiny?

17 In Masciandaro, the Fourth Circuit directed basically
18 the order in which courts are supposed to address those
19 questions, and because the first question involves a serious
20 constitutional issue, that, as Judge Wilkinson noted, could
21 have very serious implications for public safety, the Court
22 said we're going to switch the order that Chester used and
23 direct you to first address, assuming it falls within the scope
24 of the Second Amendment, does it satisfy the level of means and
25 scrutiny that would apply to it, if it were in that scope?

1 If the Court finds that the answer is yes, as the
2 Court did in *Masciandaro*, then the answer is, yes, it would
3 satisfy that. We don't need to go to the second question,
4 which is the scope question.

5 Only if the answer to that first question is to -- it
6 does not satisfy intermediate scrutiny, if you assume the
7 Second Amendment applies, do you then go to the second question
8 and ask does it apply? Does it fall within the scope?

9 So I would submit that the direction from the Fourth
10 Circuit to this Court is first assume that this regulation does
11 regulate conduct falling within the scope of the Second
12 Amendment apply the appropriate standard of scrutiny, and only
13 if Your Honor's answer to that question is no, it would not
14 satisfy that level of scrutiny, do you then go to the other
15 question of the scope of the Second Amendment and whether the
16 act falls within the scope.

17 I'll certainly address both of those issues today,
18 but I think that that is the framework that *Masciandaro* sets
19 up, and it does provide you only go to that second step if you
20 resolve the first one against the state.

21 THE COURT: So that essentially, then, if the Court
22 is inclined to or will uphold the regulation, then it can avoid
23 the constitutional issue at this procedure.

24 If the Court is inclined to strike down the
25 regulation, then the Court has to find the right in the

1 constitution first and then find it's been unconstitutionally
2 burdened?

3 MR. FADER: Right. And find that the activity at
4 issue falls within the scope of the Second Amendment.

5 THE COURT: Good.

6 MR. FADER: Yes. I also, in that context, Your
7 Honor, wanted to point to a couple other things out about the
8 Masciandaro opinion and what it directs courts to do in
9 assessing these challenges.

10 I agree with Your Honor's reading of Judge
11 Wilkinson's decision. It certainly doesn't say courts should
12 never address that second question. It just sets the order in
13 which they're to address it.

14 And Mr. Gura made a couple statements about the
15 Masciandaro case that I respectfully disagree with. One is
16 that it's a sensitive place case or a time, manner, restriction
17 case. It is not. In fact, the government made the argument to
18 the Fourth Circuit that it was a sensitive place case. The
19 government said a national park is a sensitive place, and so
20 you should treat this to fall within that presumptively lawful
21 regulation according to the Heller decision.

22 And in the Fourth Circuit's decision, they
23 specifically declined to rule on that issue of whether a
24 national park was a sensitive place, which is the time, manner,
25 place regulation issue.

1 And at page 473 of the Masciandaro decision, just
2 right at the end of subsection D, the Court said we need not,
3 however, resolve the ambiguity in the sensitive places language
4 in this case, because even if Dangerfield Island is not a
5 sensitive place, as Masciandaro argues, the regulation at issue
6 still passes constitutional muster under the intermediate
7 scrutiny standard.

8 So the Fourth Circuit in that case specifically said
9 we're not going to apply a time, manner, place. We're not
10 going to apply this sensitive place issue, which was the basis
11 for district court's decision there, because we don't need to,
12 because it satisfies intermediate scrutiny regardless.

13 I'd also point out, Your Honor, that the basically,
14 based on that same issue, Masciandaro was not saying we're
15 going to apply an intermediate scrutiny standard because this
16 was time, manner, place, or because this is sensitive -- a
17 sensitive place issue.

18 THE COURT: If I could just stop you for a minute.

19 Rogan, can you find that language here?

20 It's one of the sort of unintended consequences of
21 going from books to the computer, you can never find your place
22 in the opinion.

23 (Pause.)

24 MR. FADER: It's even more difficult in this case,
25 Your Honor, because Masciandaro, when we were briefing it,

1 hadn't yet made its way in the Federal Reporter. We were
2 dealing with one set of page references and then another one
3 now.

4 THE COURT: Good. So the text says, then, that we
5 need not, however, resolve the ambiguity in the sensitive
6 places language in this case, because even if Dangerfield
7 Island is not a sensitive place, as Masciandaro argues, the
8 section, the rule still passes constitutional muster under the
9 intermediate scrutiny standard.

10 In reaching this result, we conclude, first, that the
11 government has a substantial interest in providing for the
12 safety of individuals who visit and make use of the national
13 parks, including Dangerfield Island.

14 Although the government's interest need not be
15 compelling under intermediate scrutiny cases, sometimes
16 describes the government's interest in public safety in that
17 fashion.

18 As the District Court noted, Dangerfield Island a
19 national park area with a large number of people, including
20 children congregating. Such circumstances justify reasonable
21 measures to ensure secure public safety.

22 So as I read the opinion, I didn't read it to mean
23 that public park equals airport, school, et cetera. I read it
24 to mean that public park is just simply a place where large
25 numbers of people including children congregate and therefore

1 the rule passes intermediate scrutiny.

2 So that it is a time, place, and manner restriction
3 that is legitimate, but the legitimacy comes not from the parks
4 or the places, status as public park, but as a place where
5 people congregate.

6 Is that right?

7 MR. FADER: I think that is right, Your Honor,
8 because the Court -- the point I was trying to make initially
9 is the Court did not choose intermediate scrutiny because this
10 was a sensitive place or a time, manner, and place restriction.
11 The Court chose intermediate scrutiny as it specifically said,
12 because this was regulated conduct outside of the home.

13 THE COURT: Right. So outside the home, we use
14 intermediate scrutiny, we apply intermediate scrutiny, and we
15 find that the regulation satisfies intermediate scrutiny
16 because there are a lot of people around.

17 MR. FADER: Exactly. And in that scrutiny analysis,
18 the Court looked at the only place at issue, which was a
19 national park, and found that the government had reason to do
20 that in one of its factors in deciding that was that there were
21 a lot of people around.

22 THE COURT: There are legitimate issues about parks
23 -- this is sort of an aside. And if the police are walking
24 around Baltimore City, and they see somebody sitting out on the
25 sidewalk with a cooler, the police probably can't say I want

1 you to open up the cooler, you have to, because I want to see
2 if there's beer inside, because you look like you're 18, but it
3 would seem to me that, in a national park, a public park, that
4 the police probably would have that right, because going into
5 the park is a privilege that can be regulated.

6 But that's really another issue.

7 So it passed intermediate scrutiny not because it was
8 a public park, but because of the character of the area and the
9 number and type of people who frequent it.

10 MR. FADER: Those were certainly factors that the
11 Court used in deciding that in that case, that it easily passed
12 the intermediate scrutiny standard.

13 THE COURT: Good.

14 MR. FADER: And then, Your Honor I will turn to -- I
15 agree with Mr. Gura that your letter is certainly a very good
16 guidance for us, and we appreciate that. I also want to go
17 down and address those points as you have listed them.

18 THE COURT: Good. Thank you.

19 MR. FADER: First of all, with respect to the
20 statement of the Court right, I think Your Honor is correct,
21 and I think that Masciandaro dictates that the core of the
22 Second Amendment protection is in fact the right of law-abiding
23 individuals to possess handguns in the home for self-defense.

24 And Masciandaro specifically said that whatever the
25 scope is outside of that is what was left open by the Supreme

1 Court, but that was a matter of unanimous agreement among the
2 three judges. The only disagreement was whether to resolve it
3 in that case.

4 With respect to the second point, whether
5 intermediate scrutiny is appropriate, as we said in our brief,
6 the state does actually take the position that the more
7 appropriate level of scrutiny to apply to this is the
8 reasonable regulation level of scrutiny. However, we
9 understand that the Fourth Circuit's opinion in Masciandaro
10 certainly governs what this Court's analysis needs to be.

11 And in that case, the Court did say that regulations
12 of conduct outside the home are subject to intermediate
13 scrutiny. So we've preserved that issue for appeal, but
14 understand that intermediate scrutiny will guide this Court's
15 decision.

16 THE COURT: Good.

17 MR. FADER: With respect to the third point, we agree
18 that this case does not implicate any of the specifically
19 listed presumptively lawful measures. And this is a matter
20 that I guess a lot of different courts and commentators have
21 looked at what really are five separate points in the Supreme
22 Court's decision in Heller, where the Court was discussing
23 specifically the fact that the Second Amendment is not a right
24 of everyone to carry any type of firearm in any place they
25 want.

1 And the Court then went and listed five different
2 examples of how it's not an absolute right.

3 THE COURT: Nonexclusive examples.

4 MR. FADER: Nonexclusive examples, exactly. But it
5 characterized them in sort of three different groups. One
6 group was three presumptively lawful measures, which is the
7 group Your Honor listed in the third bullet point of your
8 letter.

9 Another group was by itself a statement in the Second
10 Amendment would only address laws dealing with firearms that
11 are in common use at the time. And they reference the Miller
12 case that wasn't stated as a presumptively lawful measure, but
13 it was another exception, if you will, to the Second Amendment
14 that it doesn't reach protection of weapons not in common use
15 at the time.

16 The first issue that the Court pointed to, though in
17 discussing why the Second Amendment is not absolute, is the
18 fact that state courts for a long time have approved of bans on
19 the concealed carry of firearms. It didn't say that was a
20 presumptively lawful measure.

21 In fact, it seemed to by virtue of its place in the
22 discussion elevated above that as the type of law that courts
23 have regularly found to be constitutional.

24 And in fact in the Supreme Court's own decision in
25 Robertson, in 1897, the Supreme Court noted that concealed

1 carry bans do not offend the Second Amendment.

2 THE COURT: One of the things that's interesting in
3 this Second Amendment area is that here in 2011, one would
4 expect that this issue would have been definitively resolved by
5 the Supreme Court years and years ago, and it's sort of
6 striking that this is an area of constitutional jurisprudence
7 where there is not much there.

8 MR. FADER: And in fact I think a lot of people
9 thought it was definitively resolved by the Supreme Court many
10 years ago in the Miller case. Obviously, the Supreme Court
11 found that the right was tied to militia service. And the
12 reason we're -- obviously Heller changed the landscape, and
13 that's why we found ourselves in this position without that
14 type of guidance.

15 But that is certainly a very interesting distinction,
16 and that's why Courts have been looking to other sources. And
17 that's why I will get to the First Amendment later, but that's
18 why courts are looking to borrow from other constitutional
19 doctrines to try to find a path here, but that's exactly right.

20 But I would suggest, obviously, the Maryland statute
21 deals with both concealed carry as well as open carry. But in
22 considering the statute, I think that, although the three
23 presumptively law regulations are not implicated by this
24 statute, the Court's statement immediately before about bans on
25 concealed carry being constitutional I think is relevant,

1 because the Maryland statute does address both things, and
2 that's relevant not concealed carry aspects of Maryland's law,
3 which doesn't go nearly so far as a ban, but is much more
4 permissive than that.

5 THE COURT: One of the things that's interesting, and
6 I was thinking about in getting ready for the hearing, is what
7 is the reason why open carry, such as open carry of a shotgun
8 or a long gun is easier to accept by the state intuitively than
9 concealed carry? The person -- if you have a person who is
10 carrying around a shotgun, he's a lot more dangerous than a
11 person who's carrying around, you know, a 38 revolver because
12 of the fire power of the shotgun.

13 Is it because law enforcement and other people can't
14 see person is carrying a concealed weapon when they're
15 interacting with them?

16 What is the rationale that says that concealed carry
17 is somehow bad while open carry is a lot better? And I had a
18 hard time just sort of teasing out the answer other than it
19 makes intuitive sense.

20 MR. FADER: Are you asking about that as far as the
21 state's position specifically in this lawsuit or historically I
22 explain it how it's developed?

23 THE COURT: Yes, that would be perfect.

24 MR. FADER: Okay. My understanding of how that's
25 developed historically, Your Honor, is that some of the cases

1 actually describe it as an issue of what's manly or not manly.
2 Some of the cases specifically use that type of language and
3 describe it as if you're carrying a concealed weapon, then
4 you're not allowing the other person a fair chance to defend
5 themselves, and that's something that only a criminal would do,
6 to be hiding it so the other person couldn't see it coming, if
7 you will.

8 Whereas open carry, you're giving the other person a
9 fair shot. And that's --

10 THE COURT: When both of you walk out on either ends
11 of the dusty street and confront each other.

12 MR. FADER: Yeah. There's actually a case from the
13 mid 19th century, dissent sort of laments the days when people
14 could settle their issues with a gunfight rather than have
15 these restrictions on guns, that the majority was upholding
16 that case.

17 But I think that's the historical evolution of it is,
18 it wasn't even law enforcement so much, although that would
19 have been much more of an issue today, it was the private
20 confrontation and the idea that the one person wasn't showing
21 their hand, if you will, and getting an unfair advantage.

22 THE COURT: Are any of the reasons that you've teased
23 out from historical level not anachronistic when applied today?

24 MR. FADER: There's the law enforcement rationale
25 certainly.

1 THE COURT: Right. That's clear.

2 MR. FADER: A big issue.

3 THE COURT: Then that is clear because when law
4 enforcement comes on the scene, they have to get a handle on,
5 make assessments about these very fluid situations. And one
6 thing they want to know is are those people armed or not? So
7 that is absolutely clear.

8 But I was thinking about the fair fight or anything
9 that might appeal to somebody and, you know, the 18th or 19th
10 century that really doesn't appeal to us anymore, other than
11 law enforcement, is there a good reason that applies today?

12 MR. FADER: As far as the distinction between
13 concealed and open?

14 THE COURT: Yes.

15 MR. FADER: I think that is the primary one, Your
16 Honor.

17 THE COURT: Good.

18 MR. FADER: With respect to the fourth bullet point
19 on this the Court should consider the regulatory scheme as a
20 whole, Mr. Gura addressed that, and it's also my understanding
21 that their challenge is limited to only this issue of good and
22 substantial reason requirement, and it doesn't go beyond that.

23 However, I think the Court's also right that in
24 addressing a specific element of the statute, you obviously
25 need to consider the entire statutory scheme, because that

1 particular element isn't there by itself, and it needs to be
2 considered in light of what the statute covers and doesn't
3 cover and the scope of the statute. So I think --

4 THE COURT: The entire statutory scheme, if you look
5 at it as a whole, is a very reasonable scheme because you have
6 the application, the application is acted upon, the person is
7 investigated.

8 If a person is turned down, there is a right to
9 appeal to a review board. The review board is not a rubber
10 stamp. They affirm the superintendent or the police only about
11 54 percent of the time. And if a person is turned down by the
12 appeals board, there is a right to appeal in the Circuit Court
13 of the applicable county.

14 The scheme does not prevent people, as I mentioned,
15 was talking about with Mr. Gura from carrying a firearm or a
16 handgun outside the house, for example, to target practice, you
17 just have to separate so you're not -- the law doesn't create
18 an island of your house, which is where the only place that you
19 can have a firearm, and there is also the right to carry the
20 long gun around for protection.

21 So that this is not -- it does not -- Maryland's
22 regulatory scheme does not have the earmarks of a system that
23 is intended to stamp out gun possession and ownership by the
24 process of regulating it into oblivion. So it all looks pretty
25 reasonable to me.

1 MR. FADER: And I think the point there is while you
2 need to consider this in the context of the overall statute,
3 any decision would be rendered just with respect to that.

4 THE COURT: There's one issue.

5 MR. FADER: Right. And with that, Your Honor, I
6 would like to turn to the key questions that Your Honor raised,
7 the first being do the regulations here at issue satisfy
8 intermediate scrutiny?

9 And this sub question Your Honor asked what's the
10 nature and extent of the state's interest in the regulations?
11 The state's interest, Your Honor, is in protecting the public
12 safety and especially in protection from handgun violence.
13 That's the -- that is recognized I think universally in the
14 courts as a compelling interest, and it was conceded in
15 briefing by the plaintiffs that the government has a compelling
16 interest in regulations to address handgun violence.

17 In the next sentence, the plaintiff said but that
18 doesn't really apply here, because there can be no compelling
19 government interest in preventing people from exercising a
20 constitutional right. And that becomes a circular argument
21 that they're making that says you have a compelling interest in
22 protecting the public and the public safety, but we're just
23 going to deem it to be the case that, whenever you're
24 exercising a constitutional right, you can't have a cognizable
25 public safety issue arise from that.

1 And I respectfully suggest that's simply not the
2 case. The First Amendment jurisprudence is obviously replete
3 with examples of people trying to exercise the right to speech
4 in a way that is injurious to public safety. It's why you have
5 the fighting words exception in the First Amendment. It's why
6 you can't scream fire in a crowded theater, that there are --
7 there are public safety, certainly allowed to take, to assess
8 public safety in deciding that whether a constitutional, in
9 deciding a challenge based on a constitutional right.

10 THE COURT: One of the things to think about when I'm
11 deciding the case does have to do with the issue that you
12 pointed out concerning the Masciandaro case and the status of
13 Dangerfield Island, because, as you pointed out, the case did
14 not turn on Dangerfield Island's status as a national park
15 area, but as an area where a large number of people including
16 children congregate for recreation, such circumstances justify
17 reasonable measures to secure public safety, and one can say
18 that such an area equals downtown.

19 So that one argument from your standpoint is that
20 Masciandaro allows prohibition of handguns in any area where a
21 large number of people including children congregate for
22 regulation, or for recreation, and that it's impossible to
23 allow or to have a regulatory system where handgun carrying is
24 confined only to areas that don't sound like that.

25 MR. FADER: I think that's right, Your Honor. And in

1 fact the Maryland statutory scheme is not limited to allowing
2 possession of handguns in the home. That's -- obviously, that
3 was the issue in Heller, that was the issue in McDonald, where
4 the Court said that they were, you know, among the most
5 restrictive gun laws that had been passed in history.

6 The Court simultaneously said that we should not
7 expect that any of other decisions upholding gun regulations
8 that had come in the past would have changed, based on the
9 Court's new interpretation of the Second Amendment.

10 The Court wasn't wholesale getting rid of decisions
11 that had upheld various regulations in the past. And one of
12 the things -- one of the issues that plaintiffs have pointed
13 out in their briefs were there were references in the Heller
14 case to recognition by some other states or some other courts
15 in the past of other places where people could possess
16 firearms.

17 The Pennsylvania state constitution provided its
18 right apply to hunting as well as self-defense. Well, the
19 Maryland and of course the recent Ezell case said there is a
20 right to possess for target practice.

21 The Maryland statutory scheme allows all of that and
22 more. The Maryland statutory scheme does not restrict the use
23 or the wear and carry of the hands guns without a permit.
24 There's no need to obtain a permit for hunting, for target
25 practice, formal or informal, for target shooting, for

1 trappings, for dog obedience classes. There are a number of
2 things that are specifically carved out that really encompass
3 pretty much every example that the courts have used of other
4 places wherein -- where courts historically have said people
5 may have a right to have a firearm.

6 The Maryland statute doesn't only apply within the
7 home, not even only apply within the business, but it reaches
8 all of those other uses as well, and I think that's very
9 important, a very important issue in both of the key questions
10 that Your Honor has posed.

11 It's an important issue in whether the statute meets
12 intermediate scrutiny, because it addresses the extent to
13 which, if you assume that there is -- that the Second Amendment
14 applies outside the home, it addresses the extent of the burden
15 that would be applied, because it is expressly permissive with
16 respect to other areas that also addresses the issue of whether
17 the Maryland statute is reasonably adapted to the government's
18 interests. It's not overly restrictive. It allows all of
19 those areas where traditional firearms would have been allowed
20 and expected to be allowed.

21 It's also very relevant to the scope inquiry, because
22 I think the first question in the scope is does the Second
23 Amendment address conduct outside of the home? That's the
24 question that was left open by Heller, and it's a very broad
25 question.

1 But that's not the only question, because even if it
2 does -- even if the Second Amendment does apply to some conduct
3 outside the home, the question is then to what?

4 And it's certainly conceivable that if the Supreme
5 Court were to find that it addresses some conduct outside the
6 home, such as hunting or target practice, that those things, of
7 course, Maryland law allows.

8 So the scope could reach those things and still not
9 implicate the constitutionality of this statute.

10 But I think it's important for --

11 THE COURT: I think one of the -- I think that's
12 right. My read, I haven't made a final decision, but reading
13 Judge Niemeyer's opinion, I thought that he did a good job of
14 sifting through the cases and the statements and the dicta and
15 reaching a very reasonable conclusion that the Second Amendment
16 does operate outside the home but in a way in context
17 explicated by the Supreme Court.

18 So if there is a way around, then I would not make
19 that holding. But if there is no way around, that's likely to
20 be the holding, which would then place us squarely in the
21 posture of examining the good reason requirement in the
22 Maryland statute.

23 It's clear from the language in the Masciandaro case
24 that the police can -- you can regulate firearms in an area
25 that has the characteristics stated in Masciandaro. The

1 question then is why does requiring a good reason, in addition
2 to a background check, why does that make it less likely that
3 they're going to be problems in these crowded areas? And is
4 there an answer to that?

5 MR. FADER: We think so, Your Honor. And it gets to
6 -- the way I look at this issue of the state's interest is sort
7 of twofold as far as deciding what the state's interest is, and
8 that's, first of all, the nature of the problem; and, secondly,
9 the benefits that the state is attempting to achieve from this
10 legislation.

11 And I'd suggest, Your Honor, we don't have to go into
12 all the statistics. It's clear Your Honor has reviewed all of
13 that. But handgun violence especially is a very serious issue
14 and a devastating issue to communities in the State of
15 Maryland, and that's the core of the problem.

16 In the statute, the General Assembly along those
17 lines made specific findings that it codified into the statute
18 as to why it was taking the step of implementing this specific
19 statutory scheme.

20 And those findings indicate that, with the
21 regulations that were in place at the time, there was an
22 alarming increase in handgun violence that the Court -- that
23 the General Assembly found based on the testimony that it
24 reviewed and the reports that it was provided that the laws
25 then in force had not been effective in curbing the more

1 frequent use in handguns in perpetrating crime and that these
2 further regulations were necessary and necessary to preserve
3 the peace and tranquility of the state and to protect the
4 rights and liberties of its citizens.

5 THE COURT: Right. If I could just stop for a
6 minute. In thinking about this, it's hard to -- if you think
7 about the regulatory scheme and the parts of it that Mr.
8 Wollard satisfies, you know, he checks every box, type of
9 person, type of gun, until we get to the good reason
10 requirement. So that I want to ask, how does the good reason
11 requirement make the public safer? And the only thing that I
12 can think of is that requiring a good reason reduces the number
13 of permits that will be issued by the state and therefore
14 reduces the number of people, who are going to be law-abiding
15 people I might add, who are going to be carrying firearms.

16 So that the question then is, is that permissible?

17 The other point is, despite all these statistics,
18 it's not the Mr. Woollards of the world who are shooting all
19 these people. You know, it's the people who are using
20 committing crimes, and we see them all the time in this court,
21 and it's almost never that Mr. Wollards of the world, it's the
22 people who are not permitted to possess firearms in the first
23 place usually because either because they're felons or because
24 they're using a firearm to commit a crime.

25 So the issue then is rationing the constitutional

1 right legitimate for protecting people in these, you know,
2 crowded areas? And it's a tough question to answer.

3 MR. FADER: Right. And of course the same rationing
4 the constitutional right of course based on what the scope of
5 the right is, and that's a separate question. But as to the
6 issue of what benefit the state gets out of it is as far as
7 protecting public safety by having a good and substantial
8 reason requirement, we have submitted a number of reasons why
9 that happens.

10 And one of the reasons is because it does in fact
11 keep people guns out of the hands of criminals when even
12 law-abiding citizens are out and about carrying their firearms,
13 they become the target for criminals to take the gun away.

14 We in fact know from the very facts of Mr. Wollard's
15 case where he pulled a gun on somebody who was invading his
16 home, and that individual took the gun away from him, and
17 fortunately he didn't aim it anybody else in the house other
18 than himself, himself being the intruder, but guns are
19 reasonably easily taken away from people when they're carrying
20 them.

21 THE COURT: If I could, because it just occurred,
22 also, if a person has a carry permit, highly likely they're
23 going to keep it a lot of the time in their glove compartment
24 or somewhere in the car, so you have the phenomenon, you have
25 increased break-ins now to steal your GPS, and if people know

1 that there are going to be firearms in more cars, then more
2 guns are going to be stolen.

3 MR. FADER: That's absolutely right, Your Honor. And
4 that is part of the declarations of some of the law enforcement
5 officers that we submitted that talked about not only in their
6 experience would that happen with private citizens who would
7 have their guns in their glove compartments, but in fact it
8 happens with police officers. Police officer's homes have been
9 targeted because criminals know there will be guns there.
10 Police officer's cars have been targeted because they know
11 there will be guns there. That would happen even more if more
12 private citizens had their guns, and that's an issue of very
13 serious concern to law enforcement and another reason why this
14 requirement does benefit public safety, by having this
15 requirement in place.

16 It also, and again as detailed in the declarations of
17 the law enforcement officers we submitted, prevents harm to
18 innocent bystanders from interjecting additional guns into
19 confrontations where confrontations before might not have
20 become deadly, now it potentially would.

21 I'd also suggest, Your Honor, that especially with
22 some of the more lenient shallow issue regimes out there, it's
23 not the case that somebody who qualifies for a permit based on
24 meeting those objective factors won't use that gun for criminal
25 activity.

1 We saw last year here in Maryland where the holder of
2 a Virginia conceal carry permit opened fire in Johns Hopkins
3 Hospital, shot the doctor who was treating his mother, then
4 killed his mother and himself. He was the holder of a permit
5 that was issued in Virginia because he checked off all those
6 boxes.

7 And we cited to the website that keeps a record of
8 those things, the violence policy center's website that I think
9 the updated figures are since I think May of 2007, 311
10 homicides by holders of permits and 11 of law enforcement
11 officers by holders of permits.

12 Mr. Gura pointed out that something less than a third
13 of those were actually suicides, but you're still left with
14 more than 200 cases since early 2007 of people who get these
15 permits, because they meet the objective boxes then using the
16 guns to commit crimes.

17 THE COURT: Well, one of the imponderables in this
18 area sort of reiterates the question that might be raised about
19 drug use. If drugs were legalized, how much would drug use
20 increase? Would it be five percent, ten percent, a hundred
21 percent? Or would it be a useful experiment to know what the
22 answer to that question is?

23 And you can sort of translate it into this issue, if
24 we eliminated the good reason requirement, how many more people
25 are going to get gun permits? Intuitively you would think that

1 not that many people, but you know, but who knows? And what
2 are the statistics? I know there are other states that are
3 very easy to get a carry permit, I think Texas is one,
4 Colorado's another.

5 Do you know what the statistics are in Texas?

6 MR. FADER: It's hard in some of these cases, Your
7 Honor, to compare because it's not necessarily apples and
8 oranges. Texas is a case where actually fewer than two percent
9 of the population has a permit. But in Texas, you only need a
10 permit to carry concealed. You don't need a permit to carry
11 open is my understanding. So it's apples and oranges, if you
12 will, because if everybody can get a permit to carry open or
13 concealed.

14 In Maryland, I don't know how you assess that. It's
15 also obviously a completely different landscape as far as the
16 people and the number of urban centers and the population
17 density and things like that.

18 So I did the math actually based on information on
19 the Texas public available information in their web site. I
20 think it's something along the lines of 1.8 percent of the
21 Texas population has a permit to carry concealed. But I don't
22 know what that would translate into if you had to have a permit
23 there to carry open as well.

24 THE COURT: 1.8, but it's still a lot of people.

25 MR. FADER: And Texas certainly has a lot more than

1 as well, but, yes.

2 THE COURT: So if you forget what the population is
3 in Maryland, 1.8 had a concealed permit, then it's still --
4 it's a fair number of people. Now, they're not always going to
5 be carrying their firearms, but I guess I'm sort of rambling
6 here, but sort of my gut, it's not an issue to be taken into
7 consideration in deciding the case, because it's irrelevant to
8 the constitutional issues, but I think that your hunch is that,
9 if you eliminated the good reason requirement, you wouldn't
10 have a run on the police department, you wouldn't have hundreds
11 of thousands of people apply. You probably would have a tick
12 upward, but not too much.

13 MR. FADER: And I don't think we know the answer to
14 that question, Your Honor. And we don't have the data to
15 support. The data we do have says that well over 90 percent of
16 the people who apply for the permits have been given them. We
17 don't know how many more people would be inclined to apply if
18 the requirement weren't there, but that's the data that we do
19 know.

20 As far as social science, Your Honor, and I think
21 it's appropriate to address that here, because we also know
22 from the social science and from the report we submitted from
23 an expert in handgun violence issues is that the prevalence of
24 guns has been shown to increase the death rate from other
25 crimes, like assault and battery.

1 When the population, civilian population, has more
2 guns, criminals tend to carry more guns and other crimes tend
3 to result in death when they might not otherwise reach that
4 lethal level.

5 Obviously, there are reports and studies that Mr.
6 Gura has also cited that claim to come to a different
7 conclusion. But I think the point of the social science that
8 we introduced goes to looking at whether the state's interest,
9 the substantial governmental interest, that needs to be
10 evaluated as part of the intermediate scrutiny standard is a
11 legitimate interest or is it pretextual?

12 And I think Your Honor explained from the makeup of
13 the statute why that gives a very good indication that this is
14 not a pretextual statute designed to get rid of gun rights,
15 because it certainly doesn't do that.

16 But the existence of the social science to support
17 the notion that these kinds of laws do in fact aid in achieving
18 the government's interest in public safety and reducing handgun
19 violence, that's where the social science comes in. It doesn't
20 stand by itself. It's not essential, but it is important in
21 looking at what the government's interest is and why the
22 government is supporting and why the General Assembly passed
23 the legislation in the first place.

24 And in fact this is an issue of again if we're
25 assuming that the Second Amendment applies outside the home,

1 the question then becomes how you analyze the government's
2 interest outside the home. I think it's important to recognize
3 what the Fourth Circuit recognizes, which is outside the home
4 is a different place than inside the home. It's a different
5 place for a number of reasons, but the majority in *Maschiandaro*
6 said, as we move outside the home, firearms rights have always
7 been more limited, because public safety interests often
8 outweigh individual interests in self-defense.

9 So I don't think you can point to the recognition of
10 a Second Amendment right in the home and the fact that the
11 *Heller* court said under any level of scrutiny an absolute ban
12 on possession of handguns in the home is unconstitutional, and
13 assume that the same analysis applies outside the home, which I
14 think is what Mr. Gura was saying we don't have to even think
15 about the level of scrutiny we just apply the constitutional
16 provision as it's written.

17 I think the Fourth Circuit in *Maschiandaro* has said
18 you have to apply a level of scrutiny, and that level is
19 intermediate scrutiny, so I think the Fourth Circuit has
20 foreclosed that as an option.

21 In addition to that, the Fourth Circuit has clearly
22 noted that the interests are different outside the home than
23 they are in. Public safety is much more of an issue outside
24 the home, much more of an issue within the state's prerogative
25 and the General Assembly's concern when it was passing this law

1 than it is inside the home. And that's what leads us to look
2 at the factors differently and to consider the public safety
3 rationale that we've just talked about the reasons why making
4 sure that only people who have a good reason to have a gun are
5 actually wearing them around in public in these crowded areas,
6 why that really does have an impact on public safety?

7 As far as how the regulations are tailored to advance
8 the state's interest, which is the second part of the
9 intermediate scrutiny question, I'd like to start with a
10 terminology point, because tailored is I think usually used in
11 the sense of a strict scrutiny standard, is it narrowly
12 tailored not government's compelling interest?

13 And in the intermediate scrutiny standard, the Fourth
14 Circuit has applied the in *Maschiandaro*. They said is the
15 regulation reasonably adaptable to the government's or adapt to
16 the government's substantial interest?

17 And in *Chester*, they use a slightly different
18 formulation of is it a reasonable fit to the government's
19 substantial interest?

20 That's the terminology, and I think it's a
21 terminology that's important in looking at how the Court is
22 supposed to analyze this. It doesn't need to be a perfect fit.
23 Your Honor was suggesting the cities might be more directly
24 analogous to the park in the concentration of people, and
25 although they might be more analogous to the park, we don't

1 need to have an intermediate scrutiny a precise fit to the
2 governmental interests. We need to have a reasonable fit to
3 it.

4 And moving on from that point, I think that the
5 state's interest is a reasonable fit. It is reasonably adapted
6 to the government interest. And part of that is what I was
7 discussing before about all of the uses of a handgun that are
8 not subject to a permit in Maryland, that apply outside of the
9 home, such as hunting and target practice and target shooting
10 and trappings and those things that show that the interest is
11 in fact -- that the burden of the regulation is narrow, because
12 it doesn't apply to any of those places that courts have really
13 identified as being places where historically you'd expect to
14 have a gun.

15 THE COURT: Well, in this case, Mr. Wollard's
16 original reason for obtaining the permit was because of the
17 presence three miles away of an individual who had invaded his
18 house. What happens if the person comes in and says I want a
19 permit to carry because I live in an area of let's say West
20 Baltimore or East Baltimore, high murder rate, drug dealers,
21 dangerous, so I wouldn't need handgun if I lived out someplace
22 elsewhere. It's more, you know, if there weren't so many
23 people, armed people I wouldn't want in my area of East
24 Baltimore.

25 Does the state give that person a permit, or does the

1 state say you can't have a permit because it's too crowded an
2 area?

3 We know what the state is, in a sense, it's
4 irrelevant, but I would be interested to know what has the
5 state done when that is the good reason that is asserted?

6 MR. FADER: I think the guidance that we have
7 generally on that, of course, that's not an as applied
8 challenge that we have here, but the appellate decisions from
9 the Maryland state courts have indicated that good and
10 substantial reason means a reason beyond mere anxiety or a
11 reason that everybody else around you shares, there should be a
12 specific reason why you instead of the person who lives next to
13 you.

14 THE COURT: So I live in a high crime area isn't
15 going to work.

16 MR. FADER: Again, we don't have that specific
17 factual context, but I think that's a fair reading of the
18 decision.

19 THE COURT: But if what would work is I own a
20 convenience store in a high-crime area, and I have to take the
21 cash receipts to the bank every night, that works in just about
22 every case unless the person's prohibited for some reason.

23 MR. FADER: The Maryland State Police have
24 established four different categories in order to assess
25 whether somebody has a good substantial reason.

1 THE COURT: One covers judicial officers, I notice.

2 MR. FADER: It does, Your Honor, along with anybody
3 else who has a job where they can take people's civil liberties
4 away is that category. But one is also the business owner who
5 carries items of street value, and so they have a process of
6 determining who falls into what category.

7 But because of the way that Maryland treats gun use,
8 even without a permit within the state, this is not even a
9 remotely similar law to the laws that were struck in Heller or
10 in McDonald, or even in Ezell.

11 Ezell, of course, addressed target practice, which is
12 specifically allowed under Maryland's law. And I also would
13 just comment again some of the discussion of Ezell before,
14 Ezell didn't recognize a freestanding right to engage in target
15 practice on its own such there is a recognition of a general
16 Second Amendment right outside of the house.

17 The basis on which the Ezell court ruled was that if
18 you're going to have a right to have a handgun in your home for
19 self-defense, you have to be able to effectively exercise that
20 right. If you can't practice shooting with the gun, then you
21 can't effectively exercise that right?

22 Although Ezell did rule that, in that case, there is
23 likelihood of success on the merits in showing that you had a
24 right to engage in target practice. It wasn't because there
25 were finding a grant a right outside the home it was

1 specifically tied to the right inside the home, and it was
2 ancillary to that right. And that's how they got to that, not
3 quite, but closer to strict scrutiny standard, because it
4 really did implicate the right in the home.

5 THE COURT: Do you agree with the recognition of the
6 advanced immediate scrutiny category, something that's between
7 strict and intermediate? Or do you think that they really,
8 they should have applied another standard? It's either
9 intermediate or strict.

10 MR. FADER: Well, and this is what I was going to get
11 into the First Amendment discussion, but I will do it now.
12 Intermediate scrutiny is frankly a flexible standard. Courts
13 have treated it as a flexible standard.

14 What I think the Ezell court did is applied immediate
15 scrutiny but higher up on the intermediate, I don't think
16 there's a separate category for advanced intermediate.

17 But that's one of the things, frankly, that the
18 courts that have been applying First Amendment jurisprudence
19 have adopted most of all from the First Amendment is its
20 flexibility in saying, okay, where on the scale does this law
21 lie as far as burdening the right?

22 And even within the intermediate scrutiny standard,
23 if it's intermediate scrutiny, but it's a really heavy burden,
24 then you go up the scale. And if it's intermediate scrutiny,
25 but it's a lighter burden, then you go down the scale.

1 That's where I think you need to consider the
2 Maryland regulation as a whole and say unlike Heller, the laws
3 of McDonald and Ezell, this regulation is very permissive with
4 respect all the places where you would usually expect to be
5 able to have a handgun without a permit, and it allows all of
6 that.

7 THE COURT: If you think about the standard, then
8 it's sort of visual or mechanistic terms, at some point,
9 there's a click, and you're up to strict scrutiny.

10 But before you get to that click, there is a very
11 flexible, flexibly applied intermediate scrutiny. And the
12 Seventh Circuit case was simply a case that was at the upper
13 end of that standard.

14 MR. FADER: I think that's correct.

15 THE COURT: We're going to have to end soon, if you
16 have any final points to make, I would appreciate them. And
17 before left I want Mr. Gura to answer the question about does
18 Masciandaro say where you have an area where you have a large
19 number of people including children and they congregate for
20 regulation, can you then ban handgun, carrying handguns in that
21 area?

22 But before we get there, Mr. Fader, do you have
23 anything else?

24 MR. FADER: Your Honor, just very briefly on the
25 scope point, I want to point out there is no other court that

1 has ever held that the scope of the Second Amendment extends
2 beyond the home with the limited exception of Ezell, which
3 itself was only tied to the right within the home, not outside
4 of it.

5 And I also did just want to address briefly that a
6 lot of what we're talking about here with this law are choices
7 that the Maryland legislature could have made when it did this.
8 We're not here to decide policy, neither of the parties want
9 Your Honor to be making policy. But the issue is did the
10 General Assembly make a permissible choice within the
11 constitutional framework that we now have when it passed this
12 law?

13 For all the reasons we've stated in our brief and
14 before you, the state certainly believes that it can. And the
15 issue is not whether a different choice could have been made.
16 The issue is not whether there is a better choice or even a
17 specifically more narrowly tailored choice because the interest
18 in intermediate scrutiny need not be permit, it might only be
19 reasonable. We would submit this was certainly a reasonable
20 choice for the Maryland legislature to make and that the
21 plaintiffs attempt to force Maryland to adopt the policy of
22 other states that had issued -- that have decided to come shall
23 issue, mostly within the last 20 to 30 years is not appropriate
24 then the Second Amendment simply did does not command that to
25 happen.

1 THE COURT: Thank you, Mr. Fader. I appreciate it
2 and all the hard work you and opposing counsel did in the case.

3 Mr. Gura, if you could just address that one issue?

4 MR. GURA: Yes, Your Honor. Masciandaro does seem to
5 state that the defendant in that case was constitutionally
6 convicted of having a gun in a park, because the park was a
7 place that had those characteristics in it, and so it is
8 clearly a place case. And this case is not the place case. We
9 look at the form that the state requires of people to fill out
10 in applying for a carry permit. There's no question about
11 where they would carry the gun.

12 The regulation at issue here does not relate to any
13 particular places, it's simply a right to carry a gun in
14 Maryland. The place is the entire state. And we while we
15 don't agree with the ultimate conclusion in Masciandaro, we do
16 agree that there will be places from which even licensed
17 individuals can be barred from having handguns, but that's not
18 the kind of case that we're in.

19 THE COURT: So that there might, for example, be the
20 state might say, for example, that you can't carry the gun in
21 Baltimore City or Prince George's County or somewhere else, but
22 that's not this case, because this case, in this case, Mr.
23 Wollard was not permitted to carry the concealed handgun
24 anywhere no matter how populated or rural.

25 MR. GURA: Your Honor, while we would not agree with

1 those laws, at the very least, if those were the kind of laws
2 at issue, we would be having a very different kind of argument.

3 It's also important to note again, as opposing
4 counsel observed, the law here doesn't make a distinction
5 between concealed and open carrying. And, again, I wish to
6 stress to the Court, as I believe we did in the briefs, we
7 don't really have a say in that as plaintiffs, and neither
8 would the Court, if the state wanted to allow only open
9 carrying or only concealed carrying for whatever reasons it
10 felt it wished to have those policies, we could not challenge
11 that.

12 Texas was noted. Actually, open carrying is not
13 allowed in Texas. We do have the statistics, though about what
14 happens there with concealed carry, that's in our reply brief.
15 Just to note in a published opinion on the Internet from the
16 Texas Department of Public Safety publishes the figures for how
17 many crimes are committed by permits holders, and I believe
18 that for 2009, the last year for which we found records out of
19 65,561 serious criminal convictions, in the State of Texas,
20 it's a big state, only 101, or 0.1541 percent could be
21 attributed to individuals who possessed handgun carry licenses.

22 I think the crux of the matter boils down to what the
23 Court noted, which is does the state have the ability to ration
24 the right to bear arms in the interest of public safety? And
25 we would claim that there is never a legitimate interest in

1 rationing a constitutional right for its own sake simply
2 because the state believes that the right is a bad idea or is
3 dangerous to public safety.

4 We are told that our arguments are circular when we
5 state that the state has a legitimate compelling interest in
6 public safety, but not an interest in barring people from
7 bearing guns.

8 Well, our arguments are only circular if the right to
9 bear arms is inherently against the public interest. If it is,
10 as opposing counsel said, in inviting juries to public safety,
11 the fighting words doctrine was cited, yelling fire in a
12 crowded theater was cited.

13 Those are classic forms of unprotected speech,
14 because they're not traditionally within the kind of speech
15 that was protected in this country.

16 Fighting words may be obviously a bad policy to
17 allow. They are also not a form of protected speech.

18 Carrying handguns for self-defense is a form of
19 Second Amendment activity and whatever else, the State of
20 Maryland does not prohibit. Of course, we concede the State of
21 Maryland's laws are on a whole much better than those of
22 Chicago, although that's not much of a standard, all the same,
23 the issue here is not about the right to go to a gun range.
24 The issue here is the right to carry a gun in public for
25 self-defense, and that is what has been tested/

1 THE COURT: Thank you, counsel. I'm going to have to
2 leave. I'm not inviting more briefing, but what I would like
3 both sides to think about it, discuss it between yourselves, if
4 there is something that you would like to file in light of the
5 questions that have been, the discussion we had this morning,
6 I'd be happy to have it. Simply let me know what the briefing
7 schedule is going to be.

8 I'm going to be away next week. I'm not probably
9 going to get an opportunity to start working on this decision
10 in earnest for let's say the next three weeks to a month. So
11 if you want to file anything else, just send me a letter with
12 the filing schedule, and I'd be happy to read it.

13 But I'm certainly not urging you to do anymore work.
14 Your briefs were really excellent, and I really enjoyed reading
15 them. Good. Thank you.

16 MR. GURA: Thank you, Your Honor.

17 MR. FADER: Thank you, Your Honor.

18 (PROCEEDINGS CONCLUDED)

19

20 I, Jacqueline Sovich, RPR, CM, do hereby certify
21 that the foregoing is a correct transcript from the
stenographic record of proceedings in the above-entitled
matter.

22

23

24 _____
Jacqueline Sovich
25 Official Court Reporter

DATE

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